

AUG 09 2016

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August 3, 2016

**OPPER  
&  
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THE ENVIRONMENTAL  
LAW GROUP

**VIA REGISTERED MAIL**  
**RETURNED RECEIPT REQUESTED AND**  
**FIRST CLASS U.S. MAIL**

Mr. Paul M. Henderson  
President  
KTA Construction, Inc.  
821 Tavern Road  
Alpine, CA 91901

Re: Environmental Harm to Property on Kearny Villa Road, San Diego  
60-day Notice of Intent to Sue; 16 U.S.C. § 1540  
60-day Notice of Intent to Sue; 33 U.S.C. § 1365  
90-day Notice of Intent to Sue; 42 U.S.C. § 6972

Dear Mr. Henderson:

On behalf of Cook Inlet Region, Inc. ("CIRI"), we are writing to notify you of our intent to file suit against KTA Construction, Inc. ("KTA") for violations of the Endangered Species Act ("ESA") 16 U.S.C. § 1531 *et seq.*, the Clean Water Act ("CWA") 33 U.S.C. § 1251 *et seq.*, and the Resource Conservation and Recovery Act ("RCRA") 42 U.S.C. § 6901 *et seq.*, in connection with the taking of San Diego fairy shrimp through the destruction of its habitat, a vernal pool basin and vernal pool sub-watershed in the Kearny Mesa Community Planning Area of San Diego. This letter is provided pursuant to the 60-day notice requirement of the citizen suit provision of ESA, 16 U.S.C. § 1540(g)(2)(C), the 60-day notice requirement of the citizen suit provision of CWA, 33 U.S.C. § 1365(b)(1)(A), and the 90-day notice requirement of the citizen suit provision of RCRA, 42 U.S.C. § 6972(c).

**I. FACTUAL BACKGROUND**

**a. San Diego Fairy Shrimp and Vernal Pools**

The San Diego fairy shrimp (*Branchinecta sandiegonensis*) is a species of crustacean between eight and sixteen millimeters in length and native to southern California and Baja California, Mexico. Its habitat consists of vernal pools with shallow to moderate depths that hold water for seven to sixty days (in all but the driest years), wherein fairy shrimp incubate, mature, and reproduce. 50 C.F.R. § 17.95(h). When these vernal pools dry out, the fairy shrimp eggs lie dormant in anticipation of the rainy season. The vernal pools, surface depressions capable of supporting numerous endemic plant and animal species, are themselves extremely delicate; more than 90% of California's vernal pools have disappeared. The fairy shrimp was designated as an endangered species in 1997 under the Endangered

Species Act of 1973. 62 Fed. Reg. 4925 (Feb. 3, 1997). Western vernal pools have been similarly protected under the Clean Water Act; in 2015, the Environmental Protection Agency and the U.S. Army Corps of Engineers jointly designated Western vernal pools as seasonal wetlands encompassed within the meaning of “waters of the United States.” 40 C.F.R. § 230.3(o).

#### **b. Property Ownership and Development**

CIRI is the property owner for a parcel of land located on Kearny Villa Road in the Kearny Mesa Community Planning Area of San Diego. This 3.57 acre parcel is a smaller portion that was split from a larger parcel in 2015. CIRI sold the other portion of the parcel (approximately 9.31 acres) to the California Highway Patrol (“CHP”). Since that time, CIRI has engaged the ecological restoration consulting firm Great Ecology to assess, develop, and market the 3.57 acre property (hereafter, the “CIRI Property”) as a third-party, turn-key mitigation project.

The free and unencumbered CIRI Property lies northeast of the intersection of Kearny Villa Road and Chesapeake Drive. The site is immediately adjacent to a functional vernal pool complex (owned by the Marine Corps Air Station) that contains San Diego fairy shrimp. In 2013, HELIX Environmental Planning prepared a Biological Technical Report of the site prior to the formal parcel split which identified seven vernal pool basins, several of which contained the San Diego fairy shrimp. During a March 16, 2016 survey, Great Ecology reconfirmed these vernal pool designations. In 2013 and 2016, the vernal pools on the CIRI Property were observed to contain several other indicator species as well, including the American pillwort (*Pilularia Americana*), dwarf woolly-heads (*Psilocarphus brevissimus*), water pygmy-weed (*Crassula aquatic*), and short-seed waterwort (*Elatine brachysperma*).

#### **c. KTA’s Encroachment and Ecological Disturbance**

On September 14, 2015, the City of San Diego contracted with KTA to install new water lines on Kearny Villa Road; on March 28, 2016, CHP granted KTA a temporary right of entry permit to the 9.31 acre parcel for a 100’x100’ construction laydown area.

On some date after March 28, 2016 and before May 18, 2016, KTA without permission from CIRI, cut a gate into the CIRI Property fence line and encroached on the CIRI Property, setting up a staging area and disturbing 0.28 acres of land at the southeastern corner of the property. KTA trenched through and flat graded 0.01 acres of vernal pool basin and 0.04 acres of vernal pool sub-watershed – the critical habitat components of the San Diego fairy shrimp. One of the two vernal pool basins affected had at least one known occurrence of San Diego fairy shrimp. KTA’s

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activities have also compromised additional onsite disturbed habitat currently undergoing transition and recovery.

In order to remedy the current damage and avoid further damage to the integrity of the vernal pools, a restoration plan must be developed that promptly addresses stabilization and restoration before the wet season begins. The following repair activities will be required:

1. Preparation of a preliminary site-specific restoration plan for the construction laydown area to be submitted for approval to relevant resource agencies, including the US Fish and Wildlife Service, and the San Diego Regional Water Quality Control Board;
2. Upon approval of the preliminary plan, preparation of a site-specific construction document level restoration plan to be submitted for regulatory approval;
3. Long-term repair of the disturbed vernal pools, their watersheds, and other disturbed open space prior to the onset of the rainy season;
4. Planting exposed soil with California native plant species that will provide erosion control and will not interfere with vernal pool re-establishment;
5. Preparation of a mitigation design package to offset construction impacts to the existing pools; and
6. Maintenance and monitoring of the restoration area in keeping with the requirements set forth by the lead agency.

On information and belief, CIRI has estimated that the mitigation ratio between the area required for compensation and the area of impact will range from 8:1 to 20:1.

## **II. STATUTORY VIOLATIONS**

### **a. Violation of ESA § 9**

ESA § 9 prohibits any person from "taking" an endangered species. 16 U.S.C. § 1538(a)(1)(B). To "take" is "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." 16 U.S.C. § 1532. This expansive definition was intended "in the broadest possible manner to include every conceivable way in which a person can take or attempt to take any fish or wildlife." S. Rep. No. 93-307, 93d Cong., 1st Sess. 7 (1973) (*quotations omitted*). Accordingly, the U.S. Fish and Wildlife Service defined "harm" to include "significant habitat modification or degradation where it actually kills or injures

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wildlife by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering.” 50 C.F.R. § 17.3.

By undertaking to clear and flat grade 0.28 acres of land on the CIRI Property containing vernal pool basins, KTA destroyed habitat known to be used by the protected fairy shrimp and thus significantly impaired their essential behavioral patterns of breeding, feeding, and sheltering. KTA also likely destroyed dormant eggs present in the vernal pool basin, killing the fairy shrimp therein. Both actions clearly resulted in harm to the species, constituting an illegal “take” in violation of ESA § 9.

**b. Violation of CWA § 301**

Under CWA § 301, “the discharge of any pollutant by any person shall be unlawful.” 33 U.S.C. § 1311. The term “pollutant” encompasses all manner of materials, including “rock, sand, [and] cellar dirt”, and the “discharge of a pollutant” entails “any addition of any pollutant to navigable waters from any point source.” 33 U.S.C. § 1362. “Point source” means “any discernable, confined and discrete conveyance.” *Id.* Lastly, “navigable waters” refers to “the waters of the United States,” which in turn have been defined broadly and include wetlands – in particular, Western vernal pools which are “seasonal wetlands located in parts of California.” *Id.*, 40 C.F.R. § 232.2.

KTA’s construction activity, which flat graded the vernal pools by filling them with gravel and dirt, is an unequivocal instance of a discharge of a pollutant from a point source to navigable waters in violation of § 301. The fill material was made up of the precise pollutants described in the statute. It was added in an isolated act to a vernal pool, one of the specified examples of the waters of the United States. Moreover, the filling of the vernal pools did not just hinder the pools’ ability to seasonally retain water and the accompanying wildlife – it eliminated it entirely.

Of course, in order for a § 505 citizen suit to proceed, KTA must be “in violation of an effluent standard or limitation,” suggesting a current state of violation and not merely an unlawful act. 33 U.S.C. § 1365. However, “so long as [the polluter] has not put in place remedial measures that clearly eliminate the cause of the violation” – which KTA has not – the ongoing violation requirement of § 505 is satisfied. *City of Mountain Park, GA v. Lakeside at Ansley, LLC*, 560 F. Supp. 2d 1288, 1296 (N.D. Ga. 2008) (citing *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*, 484 U.S. 49, 69 (1987) (Scalia, J. concurring)). KTA’s initial vernal pool destruction and subsequent inaction therefore permits a citizen suit against it.



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**c. Violation of CWA § 404**

Discharges which fail to comply with the permitting requirements of CWA § 404 are prohibited by § 301 as well. 33 U.S.C. § 1311. § 404 requires that a permit be obtained prior to any “discharge of dredged or fill material into the navigable waters...” 33 U.S.C. § 1344. Fill material is deemed to be material (such as rock, sand, soil, and construction debris) which either “replac[es] any portion of a water of the United States with dry land” or “chang[es] the bottom elevation of any portion of a water of the United States.” 33 C.F.R. 323.2(e).

The material used by KTA to flat grade the vernal pools has done both. The very purpose of the flat grading that KTA undertook was to change the bottom elevation of the pools and destroy the depression which defines them. The dry soil and gravel used to fill the pools replaced a portion of the water body – 0.01 acres of the vernal pool basin and 0.04 acres of the vernal pool sub-watershed. KTA’s actions constitute a discharge of fill material into navigable waters and thus are in violation of CWA § 404.

**d. Imminent and Substantial Endangerment under RCRA**

RCRA § 7002(a)(1)(B) provides that a citizen suit may be commenced against any person “who has contributed or who is contributing to the past or present handling...or disposal of any solid or hazardous waste which may present and imminent and substantial endangerment to health or the environment.” 42 U.S.C. § 6972(a)(1)(B). Solid waste is defined as “any garbage, refuse...and any other discarded material...resulting from industrial, commercial, mining, and agricultural operations, and from community activities...” 42 U.S.C. § 6903(27). “Discarded” material, in turn, is that which no longer serves its intended purpose. *No Spray Coalition, Inc. v. City of New York*, 252 F.3d 148, 150 (2nd Cir. 2001). Solid waste includes construction and demolition materials. *Prisco v. State of N.Y.*, 902 F. Supp. 374, 394 (S.D.N.Y. 1995).

In this instance, the fill materials KTA disposed of – earth and gravel – are undoubtedly solid waste under RCRA. They were used in construction and demolition activities and, having filled and flat graded the vernal pools, no longer have any productive use. The fill materials have already caused substantial harm to both the endangered fairy shrimp and numerous other species by destroying individual organisms and their habitat. As long as the vernal pools remain filled, the solid waste also presents an imminent threat to the continued existence of those species that rely on the presence of the vernal pools to survive.

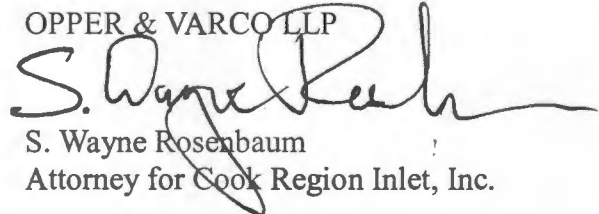
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### III. CONCLUSION

CIRI intends to file suit after 90 days if necessary to halt further adverse activities on the CIRI property and obtain assistance in the mitigation and restoration process to compensate for the vernal pool basin and fairy shrimp habitat loss. CIRI also reserves its right to allege additional applicable state claims such as nuisance and trespass. However, CIRI would prefer to work cooperatively with KTA, the San Diego Regional Water Quality Control Board, and the U.S. Fish and Wildlife Service to address these issues rather than resort to legal action. CIRI therefore requests that you contact us to see if we can work together to resolve these issues quickly and efficiently (including negotiation of an access agreement if KTA wishes to conduct a preliminary review of the CIRI property). For purposes of this notice, CIRI is located at P.O. Box 93330, Anchorage, AK 99509, and its phone number is (907) 274-8638. However, CIRI is represented by Opper & Varco and requests that you contact its counsel in response to this notice (our information is provided above). We look forward to hearing from you.

Sincerely,

OPPER & VARCO LLP



S. Wayne Rosenbaum  
Attorney for Cook Region Inlet, Inc.

cc: Gina McCarthy, *USEPA (registered mail)*  
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